

No. 45610-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

K.N.Z.; R.L.M., a minor; STEVE ZABRISKIE AND BETH ANNE
LOBEY; DEAN MANNING AND SHERRY FAWVER
Appellants,

v.

FRED J. BEEMAN, an individual; DEBBY DILLING AND JERRY
DILLING, wife and husband and the marital community composed
thereof; and CHRIS BEEMAN, an individual,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Plaintiffs will endeavor not to repeat the points and arguments made in their opening brief on appeal. The issue before the Court is quite narrow. That issue is whether, under the facts of this case, existing law or a reasonable extension of the law imposes a duty upon defendants Debby Dilling and Chris Beeman to take reasonable steps to warn plaintiffs of Fred Beeman's sexual proclivities toward young girls or to take reasonable steps to protect the minor girls from Fred Beeman.

II. DISCUSSION

A. The Trend of Existing Law Supports the Imposition of a Duty.

The trend in Washington law is for courts to find that a duty existed for one to act so as to protect people from the foreseeable acts of third parties. In 2007, the Court imposed a duty of care upon King County in *Parrilla v. King County*, 138 Wn. App. 427 (2007). The Court found that a bus driver owed and breached a duty of care by leaving his bus running when he departed the bus, knowing that there was a visibly erratic passenger on board. It was therefore foreseeable that the erratic passenger might take control of the running bus and cause harm to third parties.

Just last year the Washington Supreme Court recognized that there may be a duty to protect against the criminal acts of a third party in *Robb v. City of Seattle*, 176 Wn.2d 427 (2013). In that case, however, the court

found that the facts did not support the imposition of a duty. The police officers dealt with the criminal actor in that case, but the court found that the officers did not create or increase a risk of harm by simply failing to pick up shotgun shells that were sitting on the ground. *Id.* at 430. The officers had no dealings whatsoever with the victim who was ultimately shot by the suspect.

Later that year, the court did find a duty and breach in *Washburn v. City of Federal Way*, 178 Wn.2d 732 (2013). In *Washburn*, the police officer not only dealt with the suspect when he served an anti-harassment order upon him, but he also saw the ultimate victim in the house where the order was served. The officer was aware of the suspect's violent proclivities. He was also aware that the suspect would require an interpreter to understand the order, but rather than bringing an interpreter, the officer left it to the victim to interpret the order. Under these circumstances, the court found that the officer, by his actions, did increase the risk to the victim. *Id.* at 760.

Thus, the courts consider the interactions between the defendant the actor, the interactions between the defendant and the victim, and all the facts and circumstances at issue. Where the defendant interacts more closely with the actor and/or the victim, the court is more likely to find the existence of a duty.

To date the courts have focused on distinguishing the failure to act (nonfeasance) versus acting so as to increase the risk of harm (misfeasance). Under the circumstances of this case, the siblings' failure to warn plaintiffs about their brother or to take reasonable steps to protect the minor girls from their brother amounts to malfeasance. This was not a situation involving strangers. This was a situation involving friends and family members. The siblings knew their brother had molested minor girls. They knew that the plaintiff parents had minor girls. They knew that Fred Beeman was a friend of the plaintiff parents. Sound public policy dictates that, in the face of that knowledge, the siblings be required to warn the plaintiff parents about the dangers presented to their girls if the parents continued to socialize with their brother. This is even more the case where, as discussed in the opening brief, the siblings were charged with keeping an eye on Fred Beeman so that he would not molest again.

Existing law, the trend in existing law, and public policy considerations all support the conclusion that the defendant siblings owed the plaintiffs a duty to warn them about Fred Beeman's sexual proclivities and/or to take reasonable steps to protect the minor plaintiffs from the criminal conduct of Fred Beeman.

B. A Reasonable Extension of the Law Also Supports the Imposition of a Duty.

Even if the conduct of the siblings is considered to be nonfeasance, rather than malfeasance, the facts of this case support the imposition of a duty to warn or to protect upon the siblings of Fred Beeman. Where the persons to be protected from the conduct of another are minor children, where the people to be warned and the people who should provide the warnings are friends, and where the criminal actor and the parents of the minor children are friends, people in the position of Fred Beeman's siblings should not be exonerated for sitting idly by and saying or doing nothing.

Even if their doing nothing is considered to be "nonfeasance," their nonfeasance should be deemed actionable under the narrow circumstances of this case. Other than Beeman himself, the siblings were the only people in a position to warn plaintiffs or to take steps to ensure that Beeman was not left alone with the minor girls. Their failure to act was the proximate cause of Fred Beeman's molestation of R.L.M., and their failure to speak was the proximate cause of the Zabriskies' grave emotional distress following Fred Beeman's molestation of K.N.Z.¹

¹ Defendants challenge the declarations submitted by Dean Manning, Dillings' Brief, at 8, but that challenge is without merit. Mr. Manning initially stated that he met the siblings "in approximately 2005." CP 81 (emphasis added). He later clarified the "approximate" time when he met the siblings by confirming that it was prior to the date

Given these close relationships between the various parties the Court should find that these circumstances merit the imposition of a duty, even for nonfeasance. At the very least, this represents “a good faith argument for an extension, modification or reversal of existing law.” RJC 3.1. *See also* CR 11(a); *Wilbour v. Gallagher*, 77 Wn.2d 306, 313 (1969) (logical extensions of the law are appropriate).

C. Multiple Issues of Fact Compel the Denial of Summary Judgment.

If this Court finds a duty to warn plaintiffs or protect the minor girls from Fred Beeman, there are numerous issues of fact which will have to be resolved at the trial court. The existence of these factual issues compel the denial of defendants’ motion for summary judgment. The fact issues include:

1. When and for what purpose Chris Beeman and/or Debby Dilling took on the responsibility of keeping watch over Fred Beeman so as to ensure he would not molest other children. CP 82.
2. Whether Chris Beeman’s statement about being told to keep watch over Fred Beeman applied to him alone, or to both him and Debby Dilling. CP 5, 82.

Fred Beeman molested his daughter. CP 291. This is not an “inconsistency” that would compel the declarations to be disregarded; it is a clarification of an approximately. *Compare Marshall v. AC&S, Inc.*, 56 Wn. App. 181 (1989).

3. The extent of Dilling's knowledge as to Fred Beeman's sexual proclivities and likelihood of reoffending. CP 34-35.

4. The timing of defendant's meeting Dean Manning and his family. CP 34, 81, 290-91.

5. The nature of the relationship between Dilling and the plaintiff parents. CP 34, 81-84.

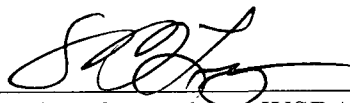
Each of the above is a genuine issue of material fact, to be determined by the fact finder upon remand. Because these factual issues exist, summary judgment should have been denied. The trial court's ruling to the contrary should be reversed, and this case should be remanded.

III. CONCLUSION

Under the facts and circumstances of this case, the failures to warn or to act to protect by defendants Debby Dilling and Chris Beeman are actionable. The Court should reverse the trial court's order granting summary judgment and remand for further proceedings.

DATED this 15 day of August, 2014.

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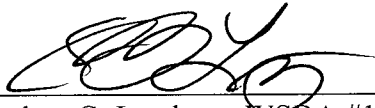
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